

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

STATE OF DELAWARE)	
)	
v.)	RK07-02-0318-01
)	Rape 3 rd (F)
MICHAEL P. HENRY)	
ID No. 0604012158)	
Defendant.)	

ORDER

On this 4th day of August, 2010, upon consideration of the Defendant's Motion for Postconviction Relief, the Commissioner's Report and Recommendation, and the record in this case, it appears that:

1. On March 17, 2008, the Defendant, Michael P. Henry ("Henry"), pled *nolo contendere* to one count of Rape in the Third Degree, 11 *Del. C.* § 771, a lesser-included offense of Rape in the First Degree. The plea was the result of a Plea Agreement between Henry and the State. In exchange for Henry's plea, the State entered a *nolle prosequi* on one count of Rape in the First Degree, one count of Continuous Sexual Abuse of a Child, one count of Unlawful Imprisonment Second Degree, two counts of Incest, and fourteen counts of Unlawful Sexual Contact in the Third Degree.

2. Prior to his sentencing, Henry filed a Motion to Withdraw his Guilty Plea. The Court appointed new counsel to represent Henry on this Motion. The bases for

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the Motion were allegations by Henry that he had new evidence proving his innocence;¹ that, at his plea, his counsel was ineffective; and that he was coerced into entering his plea. The Court found that Henry's plea had been knowingly and voluntarily entered and denied Henry's Motion.

3. A timely Notice of Appeal to the Delaware Supreme Court was filed. Henry's counsel filed a brief and Motion to Withdraw pursuant to Supreme Court Rule 26(c). In the motion, Appellate counsel represented that he conducted a conscientious review of the record, concluding that no meritorious issues existed. By letter, counsel informed Henry of the provisions of Rule 26(c), and attached a copy of the Motion to Withdraw and accompanying brief. Henry was informed of his right to supplement this attorney's presentation.

4. Henry, *pro se*, then filed a Motion for Postconviction Relief.

5. The Court referred this motion to Superior Court Commissioner Andrea M. Freud pursuant to 10 *Del. C.* §512(b) and Superior Court Criminal Rule 62 for proposed finding of facts and conclusions of law.

6. The Commissioner has filed a Report and Recommendation concluding that the motion for postconviction relief should be denied because it is procedurally barred by Rule 61(i)(3) and 61(i)(4) for failure to prove cause and prejudice, as an previously adjudicated.

7. No objections to the Report have been filed.

¹ There was no "evidence" proffered at the hearing, but Henry claimed he was not in the State of Delaware during the time of the alleged crimes.

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NOW, THEREFORE, after careful and *de novo* review of the record in this action, and for reasons stated in the Commissioner's Report and Recommendation dated July 1, 2010,

IT IS ORDERED that the Commissioner's Report and Recommendation is adopted by the Court, and the Defendant's Motion for Postconviction Relief is **DENIED**.

/s/ Robert B. Young
J.

RBV/sal
oc: Prothonotary
cc: The Honorable Andrea M. Freud
Counsel
Defendant
File

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COMMISSIONER'S REPORT AND RECOMMENDATION

**Upon Defendant's Motion for Postconviction Relief
Pursuant to Superior Court Criminal Rule 61**

R. David Favata, Esq., Deputy Attorney General, Department of Justice, for the State of Delaware.

Michael P. Henry, *Pro se*.

FREUD, Commissioner
July 1, 2010

FACTS

On March 17, 2008, the Defendant, Michael P. Henry (“Henry”), pled *nolo contendere* to one count of Rape in the Third Degree, 11 *Del. C.* § 771, a lesser-included offense of Rape in the First Degree. The plea was the result of a Plea

Agreement between Henry and the State. In exchange for Henry's plea, the State entered a *nolle prosequi* on one count of Rape in the First Degree, one count of Continuous Sexual Abuse of a Child, one count of Unlawful Imprisonment Second Degree, two counts of Incest, and fourteen counts of Unlawful Sexual Contact in the Third Degree. The charges involved the forcible vaginal rape of Henry's biological 10 year old niece and allegations of continuous unlawful sexual abuse of the victim over a period of approximately a year. The charge to which Henry pled to allegedly occurred in December 2001, at the victim's father's home. A presentence office investigation was ordered.

Prior to his sentencing, Henry filed a Motion to Withdraw his Guilty Plea. The Court appointed new counsel to represent Henry on this Motion. The basis for the Motion were allegations by Henry that he had new evidence proving his innocence;² that, at his plea, his counsel was ineffective; and that he was coerced into entering his plea. The Court found that Henry's plea had been knowingly and voluntarily entered and denied Henry's Motion.

A timely Notice of Appeal to the Delaware Supreme Court was filed. Henry's counsel filed a brief and Motion to Withdraw pursuant to Supreme Court Rule 26(c). In the motion, Appellate counsel represented that he conducted a conscientious review of the record and concluded that no meritorious issues existed. By letter, counsel informed Henry of the provisions of Rule 26(c) and attached a copy of the

² There was no "evidence" proffered at the hearing, but Henry claimed he was not in the State of Delaware during the time of the alleged crimes.

Motion to Withdraw and accompanying brief. Henry was informed of his right to supplement his attorney's presentation. Henry, *pro se*, raised one ground for appeal for the Supreme Court to consider which the Supreme Court summarized as follows:

(4) Henry raises one issue for consideration by this Court. He claims that his plea, while not coerced, was entered only because his then-counsel failed to investigate his case and uncover any exculpatory evidence. Henry alleges that he has since obtained evidence that places him outside of Delaware during the time of the alleged offenses.³

The Supreme Court granted the State's Motion to Affirm as to all of Henry's claims, including his ineffective assistance of counsel claim, ruling:

(5) . . . In this case, Henry's counsel succeeded in securing an extremely favorable plea bargain for him. There is no indication, as Henry now alleges, that his counsel failed to investigate evidence that would have exonerated him. In fact, during his plea colloquy, Henry conceded that his attorney had "done all he reasonably [could] do" for him. In the absence of any evidence of error on the part of Henry's counsel, much less evidence of error that resulted in prejudice to Henry, we conclude that Henry's claim of ineffective assistance of counsel is without merit.

(6) Henry also claims that he is "actually innocent" of the charge to which he entered his plea. As the basis for that claim, he offers a copy of a letter verifying that he was employed in New Jersey during the relevant period. However, that "evidence" does not exonerate Henry of the

³ *Henry v. State*, 2009 WL 189864, at *1 (Del. Supr.).

charge to which he entered a plea. Moreover, during his plea colloquy, Henry admitted that the State had sufficient evidence to convict him of the charge of third-degree rape. He also admitted that it was in his interest to enter the plea and that his plea was voluntary. In the absence of clear and convincing evidence to the contrary, Henry is bound by the representations he made during his plea colloquy.^{FN4}

FN4. *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997). To the extent that Henry contends that the Superior Court abused its discretion when it denied his motion to withdraw his plea, we also find that claim to be without merit. *Raison v. State*, 469 A.2d 424, 425 (Del. 1983); Super. Ct. Crim. R. 32(d).

(7) This Court has reviewed the record carefully and has concluded that Henry's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Henry's counsel has made a conscientious effort to examine the record and has properly determined that Henry could not raise a meritorious claim in this appeal.⁴

Henry has now filed a motion pursuant to Superior Court Criminal Rule 61 in which, for the third time, he raises these issues.

HENRY'S CONTENTIONS

In his Motion for Postconviction Relief, he asserts the following two grounds for relief:

Ground One: Effective Assistance of Counsel.

My attorney didn't get evidence to support my statement to

⁴ *Henry*, 2009 WL 189864, at *2.

call to family members for evidence supporting my facts.

Ground Two: Coerced Confession.

Because He didn't get evidence or call witnesses I had no other choice, but to sign the Plea. I had no evidence came after the Appeal [(emphasis in original).⁵

DISCUSSION

Under Delaware law, the Court must first determine whether Henry has met the procedural requirements of Superior Court Criminal Rule 61(i) before it may consider the merits of the postconviction relief claims.⁶ Under Rule 61, postconviction claims for relief must be brought within one year of the conviction becoming final.⁷ Henry's motion was filed in a timely fashion, thus the bar of Rule 61(i)(1) does not apply to the motion. As this is Henry's initial motion for postconviction relief, the bar of Rule 61(i)(2), which prevents consideration of any claim not previously asserted in a postconviction motion, does not apply either.

The relevant procedural bar is found in Rule 61(i)(4), which bars any ground for relief that was formerly adjudicated, unless reconsideration of the claim is

⁵ These grounds consist of Henry's claims *in toto*. He did not file any supporting memoranda. His motion attached several documents which Henry alleges established that he was in New Jersey at the time of the alleged crimes.

⁶ *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991).

⁷ Super. Ct. Crim. R. 61(i)(1).

warranted in the interest of justice.⁸ Henry raised each of his claims in his direct appeal to the Supreme Court, which found the claims meritless. Henry did not challenge the Supreme Court's ruling. Henry has made no attempt to argue why reconsideration of this claim is warranted in the interest of justice. The "interest of justice" exception of Rule 61(i)(4) has been narrowly defined to require that the movant "show...subsequent legal developments have revealed that the trial court lacked the authority to convict or punish him."⁹ This Court is not required to reconsider Henry's claim simply because it is "refined or restated."¹⁰ The only difference between Henry's Motion to Withdraw Guilty Plea and the pending postconviction motion is that Henry has attached several documents which he claims proved he was not in the State at the time of the offense. I have reviewed those documents, and, contrary to Henry's assertions, they do not prove that Henry was out of the State the entire period during which the Indictment alleged the offenses to have occurred. The documents only cover short periods, of scattered time, during the window of opportunity alleged in the Indictment. Furthermore, as noted in the preliminary hearing, there was substantial evidence that Henry was, in fact, in Delaware, at the times of the offenses. Henry's argument is misplaced and meritless.

⁸ Super. Ct. Crim. R. 61(i)(4).

⁹ *Skinner v. State*, 607 A.2d 1170, 1172 (Del. 1992) (quoting *Riley v. State*, 585 A.2d 719, 721 (Del. 1990) rev'd on other grounds, *Riley v. Taylor*, 277 F.3d 261 (3d Cir. 2001)).

¹⁰ *Id.*

For this reason, all Henry's grounds for relief should be dismissed as previously adjudicated under Rule 61(i)(4).

To the extent, if any, that Henry's claims have not been previously adjudicated, they fall into the bar of Rule 61(i)(3). If Henry did not raise his claims on appeal, he is barred by Rule 61(i)(3) from raising them, absent a clear demonstration of cause for his neglect and prejudice. He has made no attempt whatsoever to establish even the remotest cause for his failure to do so, nor has he demonstrated any prejudice. As such, these claims should be dismissed as procedurally barred by Rule 61(i)(3). A careful reading of Henry's arguments, the State's well-reasoned reply, the affidavit of Henry's prior counsel, and the transcript in this case reveal that Henry's arguments are meritless and based on supposition, conjecture, and innuendo. Henry has failed to overcome, in any way, the bars of Rule 61. As such, his Motion should be dismissed.

CONCLUSION

After reviewing the record in this case, it is clear that Henry has failed to avoid the procedural bars of Rule 61(i). Consequently, I recommend that Henry's postconviction motion be ***dismissed*** as procedurally barred by Rule 61(i)(3) and 61(i)(4) for failure to prove cause and prejudice, and as previously adjudicated.

/s/ Andrea M. Freud
Commissioner

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July 1, 2010

AMF/dsc

oc: Prothonotary

cc: Hon. Robert B. Young

R. David Favata, Esq.

Thomas D. Donovan, Esq.

Alexander W. Funk, Esq.

Michael, P. Henry, HRYCF

File